SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No.

GULF RESEARCH & DEVELOPMENT COMPANY, WELEX JET SERVICES, INC., AND BYRON JACKSON CO., PETITIONERS,

vs.

THE HONORABLE PAUL LEAHY, UNITED STATES DISTRICT JUDGE AND SCHLUMBERGER WELL SURVEYING CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

INDEX

	Original	Print
Proceedings in the United States Court of Appeals for the Third Circuit	1	1
Petition for writ of mandamus	1	1
Exhibit "A"—Complaint filed in the United States District Court for the Southern District of California in case of Gulf Research & Development Co., et al. v. Schlumberger Well Surveying Corp.	8	7
Exhibit "B"—Motion to dismiss complaint in above-entitled cause	11	9
Exhibit "C"—Opinion of the District Court in the above-entitled cause	13	11

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEB. 20, 1952.

	Original	Print
Proceedings in the United States Court of Appeals for the Third Circuit—Continued		
Petition for writ of mandamus—Continued		
Exhibits—Continued		
Exhibit "D"—Opinion of the United States Court of Appeals for the Ninth Circuit in the above-entitled cause	19	16
Exhibit "E"—Motion to transfer case in the United States District Court for the District of Delaware in case of Gulf Research & Development Co., et al. v. Schlumberger Well Surveying Corp.	23	20
Exhibit "F"—Opinion of the District Court in the above-entitled cause	25	21
Exhibit "G"—Order of District Court in the above-entitled cause denying motion to transfer case	31	27
Order to show cause	32	28
Answer of respondent	34	29
Exhibit 1—Order of transfer of United States District Court for the Southern District of California in the case of Gulf Research & Development Co., v. Schlumberger Well Surveying Corp.	38	32
Stipulation re intervention	40	33
Notice of motion for leave to intervene	41	34
Motion to intervene	42	34
Exhibit "A"—Answer of intervenor	44	35
Order granting motion for leave to intervene	48	38
Stipulation and order re filing of briefs	53	39
Appendix to brief submitted by respondent and intervenor	54	39
Opinion, Maris, J.	57	41
Order denying petition for mandamus	65	48
Clerk's certificate (omitted in printing)	66	
Order allowing certiorari	67	49

[fol. 1]

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF MANDAMUS IN GULF RESEARCH & DEVELOPMENT COMPANY ET AL. V. SCHLUMBERGER WELL SURVEYING CORPORATION, CIVIL ACTION NO. 1342 IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

To the Honorable Judges of the United States Court of Appeals for the Third Circuit:

Petitioners Gulf Research & Development Company, Welex Jet Services, Inc., and Byron Jackson Co., being corporations duly organized and existing under the laws of, respectively, the State of Delaware, the State of Texas, and the State of Delaware, but having their principal places of business in, respectively, Pittsburgh, Pennsylvania, Fort Worth, Texas, and Los Angeles, California, file this their petition for writ of mandamus to The Honorable Paul Leahy, United States District Judge for the District of Delaware, directing him to nullify, vacate, and set aside an order entered by him on the 23rd day of May, 1951, in a case entitled *Gulf Research & Development Company, Welex Jet Services, Inc.*, and *Byron Jackson Co. v. Schlumberger Well Surveying Corporation*, Civil Action No. 1342 in the United States District Court for the District of Delaware, denying, for reasons not bearing upon the merits thereof a motion of petitioners for an order transferring said action to the United States District Court for the Southern District of California, Central Division; and either directing said Honorable Judge to consider said motion on its merits and to determine thereupon whether said motion should be granted, or, in the alternative and after consideration thereof by this Court, directing him to grant said motion; and for cause show:

[fol. 2] Nature of the Suit and Proceedings

On March 20, 1950, petitioners, as plaintiffs, filed a complaint in the United States District Court for the Southern District of California, Central Division, against Schlum-

berger Well Surveying Corporation, charging infringement of Letters Patent of the United States and alleging that the action arose under the Patent Laws of the United States. A copy of the complaint is submitted herewith as Exhibit A. The substance of the allegations is as follows:

1-3. Plaintiffs Gulf Research & Development Company, Welex Jet Services, Inc., and Byron Jackson Co., are corporations duly organized and existing under the laws of, respectively, the State of Delaware, the State of Texas, and the State of Delaware, and have their principal places of business in, respectively, Pittsburgh, Pennsylvania, Fort Worth, Texas, and Los Angeles, California.

4. Defendant, Schlumberger Well Surveying Corporation, is a corporation duly organized and existing under the laws of the State of Delaware, "and is doing business in the Southern District of California, Central Division, and for the purposes of this action is a resident thereof".

5. This is an action by plaintiffs for infringement by defendant of Letters Patent of the United States, and arises under the Patent Laws of the United States.

6-10. Plaintiffs are the owner and successive exclusive licensees of United States Letters Patent No. 2,494,256. Since issue of said Letters Patent defendant has been and now is infringing said Letters Patent and intends to continue so to do. Defendant has been duly notified of its infringement of said Letters Patent. Plaintiffs demand an injunction against further infringement and an accounting for damages for said infringement.

[fol. 3] Proceedings Following the Filing of the Complaint

A. In the United States District Court for the Southern District of California, Central Division

After service of summons, and before answering, defendant moved under the provisions of Section 1406(a) of Title 28, United States Code, for an order dismissing the complaint because of improper venue. A copy of said motion is submitted herewith as Exhibit B. Said motion was based on the contentions that Section 1400(b) of Title 28, United States Code, is the exclusive statutory provision controlling venue in patent infringement actions; that Section 1391(c)

of Title 28, United States Code, does not provide a definition of the residence of a defendant corporation for Section 1400(b); and that the enactment of the 1948 revision of the Judicial Code did not broaden the venue as to corporate defendants in patent infringement actions.

Petitioners agreed with defendant that Section 1400(b) is the exclusive statutory provision controlling venue in patent infringement actions but contended that the word "residence" could not have two different meanings in the same Chapter of Title 28 and that, no ambiguity appearing in the statute itself, no recourse could be had to extraneous matters first to raise an ambiguity and thereafter to decide it.

District Judge Ben Harrison filed an opinion on August 2, 1950. In it he recognized that two other judges of his court had arrived at a different conclusion and nevertheless held for defendant but that the action should be transferred to the District of Delaware rather than dismissed. A copy of said opinion is submitted herewith as Exhibit C. On August 18, 1950, Judge Harrison entered an order of transfer to carry out his opinion and on the same day entered an order staying all proceedings in the action, including its transfer for ten days to permit petitioners to apply to the United States Court of Appeals for the Ninth Circuit for [fol. 4] leave to file a petition for writ of mandamus or prohibition, and, if the application be granted, until determination of the matter by the Court of Appeals for the Ninth Circuit.

B. In the United States Court of Appeals for the Ninth Circuit

The United States Court of Appeals for the Ninth Circuit granted leave to petitioners to file their petition for writ of mandamus, but after oral arguments it filed an opinion on November 20, 1950 denying the petition. A copy of said opinion is submitted herewith as Exhibit D. The grounds of denial were simply that there were no "extraordinary circumstances" to justify the issuance of the writ, and that the error, if any, as to which no view was expressed, would be reviewable on appeal to the United States Court of Appeals for the Third Circuit after final judg-

ment. Judge Harrison's order of transfer was effectuated on December 26, 1950 by the mailing of the original papers comprising the record to the United States District Court for the District of Delaware.

C. In the United States District Court for the District of Delaware

The original papers comprising the record in said action were received and filed in the United States District Court for the District of Delaware on transfer on January 2, 1951. On the following day, January 3, 1951, plaintiffs filed their motion to transfer the action to the United States District Court for the Southern District of California, Central Division, on the ground that the action was first brought there, that venue was properly laid therein, and that the transfer to the District of Delaware had been improper and contrary to law. A copy of said motion is submitted herewith as Exhibit E.

Briefs were filed by the respective parties and the motion was argued on March 19, 1951, before Judge Leahy.

[fol. 5] Opinion and Order of Trial Court

On May 18, 1951, Judge Leahy filed an opinion in said action in which he decided that, "regardless of [his] own view as to whether the California Court was right in its interpretation of § 1391(c) and 1400(b), and, admittedly, there is serious conflict as to the proper interpretation of those sections [he did] not think it meet or proper that [he] review Judge Harrison's decision on the merits", although he found he had the power so to do, and therefore that the motion to transfer should be denied. A copy of said opinion is submitted herewith as Exhibit F. On May 23, 1951, Judge Leahy entered an order denying the motion to transfer for the reasons stated in his opinion. A copy of said order is submitted herewith as Exhibit G.

Basis of Court's Jurisdiction

Jurisdiction is invoked herewith pursuant to Section 1651(a) of Title 28, United States Code, which authorizes this Court to issue all writs necessary or appropriate in aid of its jurisdiction and agreeable to the usages and prin-

ciples of law. See *Paramount Pictures, Inc., et al. v. Rodney, U. S. District Judge, et al.*, 186 F. (2d) 111 (C. A. 3, 1951); cert. denied, — U. S. —, 19 Law Week 3258 (March 26, 1951).

Reasons for Allowance of Writ

This is an appropriate case for the Court to exercise its power to issue all necessary and appropriate writs under Section 1651(a) of Title 28, United States Code, for the following reasons:

(1) The order complained of is interlocutory and is not appealable under Section 1291 or Section 1292, Title 28, United States Code. The matter involved lies outside the issues of the case. There is no final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it.

(2) The Delaware District Court has refused to exercise its authority to decide petitioners' motion to transfer on its merits when it is its duty to do so.

[fol. 6] (3) The refusal of the District Court to decide petitioners' motion to transfer on its merits constitutes an error which will be incorrectable on appeal after final judgment because petitioners will not be able to show that a different result would have been reached had the suit been transferred.

(4) As the order of the California District Court was entered without statutory sanction and authority, in that it was not based on any exercise of discretion or finding as to disputed facts but on an erroneous interpretation of the law, the Delaware District Court is without authority to hear and determine this action over plaintiffs' objections. Even assuming that a final judgment against petitioners might be set aside thereafter on appeal as a nullity, petitioners will have been caused great hardship and to expend great amounts of time, effort, and money all for naught.

(5) Petitioners have been deprived of the rights given to them by the Congress of the United States through Sections 1391(c) and 1400(b) of Title 28, United States Code, to choose the venue of their action from among those thereby made permissible. The error of the decision on the merits by the California District Court, which error was continued

by the Delaware District Court by its refusal to consider petitioners' motion on its merits, is in conflict with two other decisions on the same point in the same Court; is in conflict with a decision of the Delaware District Court; is in conflict with the overwhelming weight of the holdings of the courts which have considered the question; is in conflict with statements made by this Court; and is in conflict with the unanimous views of the text writers.

Wherefore petitioners pray:

A. That a rule be issued directed to The Honorable Paul Leahy, United States District Judge for the District of Delaware, to show cause, if any he has, why a writ of mandamus should not issue, said rule to be returnable as promptly as the situation permits, and that thereafter a writ of mandamus be issued as prayed, directing him [fol. 7] to nullify, vacate, and set aside, the order entered May 23, 1951, in said *Gulf, et al. v. Schlumberger*, denying petitioners' motion to transfer said action to the United States District Court for the Southern District of California, Central Division; and either directing said Honorable Judge thereafter to consider said motion on its merits and to determine thereupon whether said motion should be granted, or, in the alternative and after consideration thereof by this Court, directing him to grant said motion.

2. That petitioners have such other and further relief as may be deemed to be proper and justifiable under all the facts and circumstances.

May 24, 1951.

Thomas Cooch, Morford, Bennethum, Marvel & Cooch, Delaware Trust Building, Wilmington 1, Delaware, Attorneys for Petitioners.

Leonard S. Lyon, Leonard S. Lyon, Jr., Richard E. Lyon, Lyon and Lyon, 811 West Seventh Street, Los Angeles 17, California, of Counsel for Petitioners.

[fol. 8] EXHIBIT A TO PETITION

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

Civil Action No. 11264-BH

GULF RESEARCH & DEVELOPMENT COMPANY, WELEX JET SERVICES, INC., and BYRON JACKSON CO., Plaintiffs,

v.

SCHLUMBERGER WELL SURVEYING CORPORATION, Defendant

COMPLAINT

Plaintiffs, complaining of defendant, allege:

I

Plaintiff Gulf Research & Development Company is a corporation duly organized and existing under the laws of the State of Delaware, having its principal place of business in Pittsburgh, Pennsylvania.

II

Plaintiff Welex Jet Services, Inc. is a corporation duly organized and existing under the laws of the State of Texas, having its principal place of business in Fort Worth, Texas.

III

Plaintiff Byron Jackson Co. is a corporation duly organized and existing under the laws of the State of Delaware, having its principal place of business in Los Angeles, California.

[fol. 9] IV

Defendant, Schlumberger Well Surveying Corporation, is a corporation duly organized and existing under the laws of the State of Delaware, and is doing business in the Southern District of California, Central Division, and for the purposes of this action is a resident thereof.

V

This is an action by plaintiffs for infringement by defendant of Letters Patent of the United States, and arises under the Patent Laws of the United States.

VI

On January 10, 1950, United States Letters Patent No. 2,494,256 were duly and legally issued to plaintiff Gulf Research & Development Company, assignee of Morris Muskat of Oakmont, Pennsylvania, and Floyd W. Parker and William L. Kehl, both of Penn Township, Allegheny county, Pennsylvania.

VII

Plaintiff Welex Jet Services, Inc. is and since March 19, 1949 has been exclusive licensee with the right to sublicense in respect to and under the inventions of said Letters Patent No. 2,494,256 under said plaintiff Gulf Research & Development Company.

VIII

Plaintiff Byron Jackson Co. is and since March 19, 1949 has been exclusive licensee with the right to sublicense in respect to and under the inventions of said Letters Patent No. 2,494,256 under said plaintiff Welex Jet Services, Inc.

IX

Since the issue of said Letters Patent defendant has been and now is infringing said Letters Patent and intends to continue so to do.

[fol. 10]

X

Defendant has been duly notified of plaintiffs' claim of infringement of said Letters Patent and notwithstanding said notice has refused to respect said Letters Patent.

Wherefore, plaintiffs demand an injunction against further infringement by defendant and those controlled by defendant, an accounting for damages for said infringe-

ment, and an assessment of costs against defendant, including a reasonable attorney's fee.

Gulf Research & Development Company, Welex Jet Services, Inc. and Byron Jackson Co., by (S.) Leonard S. Lyon, Leonard S. Lyon, Jr., Attorneys for Plaintiffs.

[fol. 11] EXHIBIT B TO PETITION

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

Civil Action No. 11264-BH

GULF RESEARCH & DEVELOPMENT COMPANY, WELEX JET SERVICES, INC., and BYRON JACKSON COMPANY, Plaintiffs,

v.

SCHLUMBERGER WELL SURVEYING CORPORATION, Defendant

MOTION TO DISMISS COMPLAINT UNDER SECTION 1406(a) OF THE UNITED STATES CODE, TITLE 28

Now comes Schlumberger Well Surveying Corporation, Defendant in the above-entitled cause, by its attorneys, appearing specially and only for the purpose of this Motion, and moves this Court, in accordance with Rule 12(b) of the Federal Rules of Civil Procedure, for an order dismissing the complaint in the above-entitled cause because of improper venue.

In support of such Motion, Defendant represents as follows:

1. This is an action for patent infringement and proper venue must be determined by Section 1400(b) of Title 28 of the United States Code.

2. Defendant, being a corporation of the State of Delaware, is a resident of that State and not the State of California within the meaning of Section 1400(b) of the United States Code, Title 28, as appears from the affidavit of Roger Henquet, attached hereto.

3. United States Letters Patent No. 2,494,256, here in suit, describe and claim apparatus wherein shaped explo- [fol. 12] sive charges are used to shoot holes in or to perforate well casings or well walls.

4. Defendant has not used within the State of California shaped explosive charges to shoot holes in or to perforate well casings or well walls, or for any other purpose, as more fully appears in the affidavit of Roger Henquet, attached hereto, and, hence has not committed within the State of California *and* acts capable of being alleged to be an infringement of said United States Letters Patent No. 2,494,256 as required by the alternate ground for venue set forth in Section 1400(b).

Wherefore, Defendant respectfully moves the Court that the complaint herein be dismissed.

This Motion is based upon the following:

The Complaint
The accompanying Affidavit of Roger Henquet
United States Letters Patent No. 2,494,256
Rule 12(b) of the Federal Rules of Civil Procedure
Section 1400(b) and 1406(a) of the United States Code, Title 28
The accompanying memorandum of Defendant and the cases cited therein.

Respectfully submitted, Hill, Morgan & Farrer, by (S.) William M. Farrer, Attorneys for Defendant Appearing Specially.

(S.) Worthington Campbell, Mark N. Donohue, Campbell, Brumbaugh, Free & Graves, of Counsel for Defendant.

[fol. 13] EXHIBIT C TO PETITION

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

No. 11264-BH

GULF RESEARCH & DEVELOPMENT COMPANY, WELEX JET SERVICES, INC., and Byron Jackson Company, Plaintiffs,

vs.

SCHLUMBERGER WELL SURVEYING CORPORATION, Defendant

OPINION

In the above entitled patent infringement action the defendant corporation has moved for an order dismissing the complaint because of improper venue, on the ground that the complaint fails to allege acts of infringement in this district as provided under Section 1400(b) Title 28 U.S.C.A. as revised, which reads as follows:

> "Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business."

It is the contention of the plaintiffs that Section 1391(c) of Title 28 U.S.C.A. as revised, changes the rule set forth in Stonite Products Co. v. Melvin Lloyd Co. et al., 315 U. S. 561, and that Section 1400(b) is no longer the exclusive provision controlling venue in patent infringement proceedings. Plaintiffs contend that the general provisions of Section 1391(c) reading as follows:

> "A corporation may be sued in any judicial district in which it is incorporated or licensed to do business [fol. 14] or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

are in effect a definition of "residence" for venue purposes, and the use of the word "resides" in Section 1400(b) is controlled by such definition.

The new Federal Judicial Code is nothing more or less than a revision and restatement of existing law. Where any change is made it appears in the Reviser's Notes. (8 F.R.D. 442): "As the title of the bill indicates, the object of the Committee was to revise and codify existing law. • • •" (8 F.R.D. 201).

The Reviser's Notes indicate no change in existing law relative to venue in patent infringement actions. Section 1391 is a consolidation of Section 111 of Title 28 U.S.C.A. with part of Section 112 of the same title and no change in meaning is noted. In fact Section 1391(c) stems directly from the old Section 112 and states nothing more than the prior existing procedure to obtain venue over a foreign corporation. (See citations under Note 217, former Section 112 U.S.C.A.).

In an article written by Wm. W. Barron, Chief Reviser of Title 28 U.S.C.A. reported in 8 F.R.D. 445, it stated:

> "The usual rules of statutory construction, with one exception, apply to statutory revision. That exception is important and its reasons should be readily recognized.
>
> "Because of the necessity of consolidating, simplifying and clarifying numerous component statutory enactments no changes of law or policy will be presumed from changes of language in revision unless an intent to make such changes is clearly expressed.
>
> "Mere changes of phraseology indicate no intent to work a change of meaning but merely an effort to state [fol. 15] in clear and simpler terms the original meaning of the statute revised.
>
> "Congress recognized this rule by including in its reports the complete Reviser's Notes to each section in which are noted all instances where change is intended and the reasons therefor.
>
> "The rule is well settled. Leading cases supporting it are collected in the appendix."

The leading case cited is U. S. v. Ryder, 110 U. S. 729, 740, 4 S. Ct. 196, 201 wherein the rule was stated as follows: "It will not be inferred that the legislature, in revising and consolidating the laws, intended to change their policy, unless

such intention be clearly expressed." (See also 59 C. J. 897).

In the new work on Federal Practice by Barron and Holtzoff at page 135, Volume 1, appears the following language:

> "• • • A special venue statute, i.e., one expressly covering venue of a particular kind of action, will control over a general venue statute, but the general statute will govern if a cause of action is created by a special statute without any special venue provision."

In 25 R.C.L. page 1010 appears the following:

> "It is an old and familiar rule, which is closely related to the doctrine of ejusdem generis and to the rule that where an act contains special provisions they must be read as exceptions to a general provision in a separate earlier or subsequent act, that where there is in the same statute a particular enactment, and also a general one which in its most comprehensive sense would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment."

[fol. 16] See also 59 C. J. 1056; Atkins v. The Fiber Disintegrating Co., 85 U. S. 272, 21 L. Ed. 841, 844; Ginsberg & Sons v. Popkin, 285 U. S. 204, 208; 50 Am. Jur. 370.

To follow the plaintiffs' argument the court would have to violate the above principles of statutory construction.

Plaintiffs rely heavily upon Moore's Commentary on U. S. Judicial Code and particularly at pages 184 and 185, and Moore's Federal Practice, Vol. III, pp. 2139, 2140, wherein the author considers the case of Stonite Products v. Lloyd, supra, overruled by the gearing of residence under Section 1391(c) to Section 1400(b).

Yet the author as a paid consultant in testifying before Subcommittee No. 1 stated that: "Venue provisions have not been altered by the revision." He then proceeds to point out certain changes applying to patent infringement

cases. (U. S. Code Congressional Service (1948) p. 1969, Title 28 Pamphlet).

To say the least the two statements are inconsistent. Prof. Moore in a letter explaining the inconsistencies states in part: "In brief, my House statement was prepared on short notice and under pressure; my published writings are prepared after careful and extensive deliberation."

But the real question is: Did Congress intend to change the venue provisions in patent infringement cases where the defendant is a corporation? Professor Moore's statement before the Committee tended to establish that the revised section caused no change in existing law. The Committee relied and acted upon his testimony along with the testimony given by others. The hearings before the Committee clearly indicate that no change in venue statutes was cont-mplated by Congress except such changes as were expressly set forth in the Reviser's Notes.

Plaintiffs' contention would make said Section 1400(b) ineffective in so far as a corporation is concerned, when its very wording indicates that a corporation is included. This conclusion is supporated by that portion of the Reviser's [fol. 17] Notes which reads as follows: "Words 'whether a person, partnership, or corporation' before 'has committed' were omitted as surplusage." In the portion of the former Section 109 "whether a person, partnership or corporation" were omitted as surplusage, then the word "defendant" as set forth in Section 1400(b) is all inclusive and includes corporations. It logically follows if plaintiffs' contention is to be accepted, the benefits granted by Section 1400(b) would be denied to corporate defendants.

In the recent case of Ackerman v. Hook, decided June 16, 1950, by the Third Circuit and reported in 86 U.S.P.Q., p. 1, involving the relationship of Section 1392 to Section 1400(b), the court stated:

> "Beyond all doubt, until the adoption of the new Title 28 in 1948, Section 109 was 'the exclusive provision controlling venue in patent infringement proceedings'. Stonite Co. v. Melvin Lloyd Co., 315 U. S. 561, 563 (52 U.S.P.Q. 507, 508). In that decision the Supreme Court expressly rejected the argument that Section 113 supplemented Section 109 because of its

prior enactment and that the sections were complementary. Stonite Co. v. Melvin Lloyd Co., supra, pp. 566, 567 (52 U.S.P.Q. at 509-510). *The Reviser's Notes make it evident that today, 1400(b) stands in the same situation as did Section 109 at the time of the Stonite opinion in 1942 and that the Stonite case is just as much in point now as then.* Therefore, since it did not appear on the motion to dismiss that any of the appellees have 'a regular and established place of business' in the Eastern District of Pennsylvania, the Court of that District had no jurisdiction over them under the controlling Section 1400(b)." (Italics supplied.)

The defendant's position is further supported by the case of Arkay Infants Wear, Inc. v. Kline's, Inc., 85 F. Supp. 98 and Fischer v. Karl, 84 F. Supp. 53.

The contentions of the plaintiffs' present problems are broader than the sections herein involved. Are the courts [fol. 18] going to take the revised Title 28 and treat it as a fresh piece of clay to model to their own liking, or are they going to accept the revised codes as a true revision of existing law that through prior decisions has blazed a trail for them to follow? The increased number of reported cases involving the revised Title 28 indicates the invitation extended to the courts to do their own modeling is at hand, thus opening the flood gates of litigation, thereby destroying the advantages sought by the revision and discouraging like revisions of the other codes.

I believe the Reviser's Notes together with the evidence presented to the Congressional Committee should be the exclusive guide to a proper interpretation and construction of the revised sections. I believe that Congress so intended.

In conformity with my conclusions I hold that Section 1391(c) is not complementary to Section 1400(b); that the word "resides" in Section 1400(b) means the same as the word "inhabitant" in the former Section 109, and that the interpretation placed upon said former Section 109 applies to its revision as set forth in the revised Section 1400(b). I believe the Stonite case is still the law and the fact that the defendant committed no acts of infringement in this district indicates to me that the venue is improper.

I am fully aware that two of my able brethren of this

district have arrived at a different conclusion than I have here expressed. I respect their views but cannot follow them.

In accordance with the provision of Section 1406(a), Title 28, the above entitled action is hereby ordered transferred to the District of Delaware. (Schiller v. Mit-Clip Co., Inc., 180 F. 2d, 654.)

Counsel for defendant is directed to submit to me promptly an order of transfer in accordance with the view herein expressed.

Dated: This 2nd day of August, 1950.

(S.) Ben Harrison, Judge.

[fol. 19] EXHIBIT D TO PETITION

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 12,667

Nov. 20, 1950

GULF RESEARCH & DEVELOPMENT COMPANY, WELEX JET SERVICES, INC., and BYRON JACKSON CO., Petitioners,

vs.

HONORABLE BEN HARRISON, JUDGE, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION, Respondent

OPINION

On Petition for Writ of Mandamus

Before Stephens, Bone and Orr, Circuit Judges

ORR, Circuit Judge:

We have for determination a petition for a writ of mandamus to compel the Judge of the District Court for the Southern District of California to withdraw an order of transferral entered in a suit instituted by petitioners seeking damages for alleged patent infringement. In the

suit, jurisdiction being conceded, venue was asserted under 28 U. S. C. A. § 1400 (b),[1] as interpreted in the light of 28 U. S. C. A. § 1391 (c),[2] in Radio Corporation of America v. [fol. 20] Paramount Pictures, Inc., 1940, U. S. D. C. S. D. Cal., No. 8070-WM (not reported), and Farr Co. v. Gratiot, 1950, U. S. D. C. S. D. Cal., 92 F. Supp. 320. This case was ordered transferred, under 28 U. S. C. A. § 1406 (a),[3] to the District Court for the District of Delaware, on the ground that the definition of corporate "residence" in § 1391 (c) is not applicable to § 1400 (b). The order being not appealable,[4] the petitioners assert mandamus to be the sole remedy open to them.

The power of this court to issue mandamus can be exercised to protect its appellate jurisdiction. 28 U. S. C. A. § 1651. Thus, the writ will issue to compel an inferior court to proceed in an action which properly invokes that court's jurisdiction in order to prevent the inferior court, by inaction, from frustrating the legitimate appellate jurisdic-

---

[1] "§ 1400 Patents and copyrights. • • •

"(b) Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business."

[2] "§ 1391. Venue generally. • • •

"(c) A corporation may be sued in any judicial district in which it is incorproated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

[3] "§ 1406. Cure or waiver of defects.

"(a) The district court of a district in which is filed a case laying venue in the wrong division of district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

[4] Magnetic Engineering & Mfg. Co. v. Dings Mfg. Co., 2 Cir., 1950, 178 F. 2d 866;

cf. Jiffy Lubricator Co. v. Stewart-Warner Corp., 4 Cir. 1949, 177 F. 2d 360.

tion of this court.[5] Similarly, under the practice prior to the disabling legislation of 1875 and 1887, this court would review by mandamus an order of a district court remanding a removed case to a state court, because a remand put an end to all federal jurisdiction.[6]

In a recent case the Second Circuit asserted that the power of a Circuit Court to protect its appellate jurisdiction did not extend "to protecting it as against the jurisdiction of another federal court of equal jurisdiction, (and) that a suitor has (no) legally protected interest in having his action tried in any particular federal court, except in so far as the transfer may handicap his presentation of the case, or add to the costs of trial." Magnetic Engineering [fol. 21] & Mfg. Co. v. Dings Mfg. Co., 2 Cir. 1950, 178 F. 2d 866, 869. We do not hold that a circuit court would under no circumstances have power to review by mandamus an order transferring a case to the district court of another circuit. We are of the opinion that once a suitor has properly invoked federal jurisdiction in this circuit it is within our power, in extraordinary circumstances, to issue mandamus to prevent a grave miscarriage of justice.

Although we conclude that we have jurisdiction to issue the writ, it has been repeatedly held that: "Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. * * * (T)hey have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. Those remedies should be resorted to only where appeal is a clearly inadequate remedy. * * * As extraordinary remedies, they are reserved for really extraordinary cases." Ex parte Fahey, 1947, 332 U. S. 258, 259-60. In this case, no extraordinary circumstances have been called to our attention. Petitioner alleges nothing more than an erroneous application of the law. The error, if any, will be reviewable on appeal to the Court of Appeals for the Third Circuit, after final judgment

---

[5] Cf. McClellan v. Carland, 1910, 217 U. S. 268.

[6] See the discussion in Magnetic Engineering & Mfg. Co. v. Dings Mfg. Co., supra, note 4.

has been entered.[7] Mandamus cannot be subverted to perform the function of an interlocutory appeal, over which we have no jurisdiction. The inconvenience of proceeding to what may be an unnecessary trial has long been recognized as one of the hardships of litigation in our judicial system, but such hardship does not measure up to the inconveniences which would result if piecemeal appeals were permitted. Accordingly, this inconvenience has consistently been held insufficient to justify mandamus.[8]

[fol. 22] Nor have petitioners shown any peculiar hardship to be suffered as a result of this transfer. The record does not disclose the locality where the alleged infringement took place, but it is conceded that it did not occur in the Southern District of California. Hence, it does not appear that a trial in Delaware would be more expensive or burdensome than a trial in California. We note further that petitioners, being three corporations, two incorporated in Delaware and one in Texas, have their principal places of business in California, Texas and Pennsylvania.

The Second Circuit, in Magnetic Engineering & Mfg. Co. v. Dings Mfg. Co., supra, rejected the contention that review of a transfer order on appeal after final judgment would not be an adequate remedy for the petitioners because prejudice of such transfer could not easily be shown, and that therefore mandamus should issue to prevent such a transfer. The contention is directed toward the desirability of permitting interlocutory appeals generally, but does not justify resort to the extraordinary remedy of mandamus. The remedy of appeal from a final judgment is "inadequate" so as to justify the use of mandamus only when it

---

[7] The alleged error is to be distinguished from that involved in Foster-Milburn Co. v. Knight, 2 Cir. 1950, 181 F. 2d 949. The order reviewed in that case purported to transfer the case to a court which would not have jurisdiction over the parties. The error was therefore not merely potentially reversible error on appeal, but would render void any final judgment ultimately obtained, and may be regarded as analogous to a refusal to exercise effectively jurisdiction properly invoked.

[8] Roche v. Evaporated Milk Ass'n., 1943, 319 U. S. 21.

is totally unavailable, or when, because of the particular circumstances, it could not correct extraordinary hardship.

Petitioners have urged that the need for uniformity of interpretation of the Judicial Code within a given district justifies review by way of mandamus. We cannot agree that such a situation justifies resort to this extraordinary remedy. Such a determination may ultimately be required in a review of an order denying a change of venue.

Petition denied.

(Endorsed:) Opinion. Filed Nov. 20, 1950. Paul P. O'Brien, Clerk.

[fol. 23] EXHIBIT E TO PETITION

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Civil Action No. 1342

GULF RESEARCH & DEVELOPMENT COMPANY, WELEX JET SERVICES, INC., and BYRON JACKSON CO., Plaintiffs,

vs.

SCHLUMBERGER WELL SURVEYING CORPORATION, Defendant

MOTION TO TRANSFER CASE

Come now the Plaintiffs, Gulf Research & Development Company, Welex Jet Services, Inc., and Byron Jackson Co., by their attorneys and move this Honorable Court for an order transferring this action to the United States District Court for the Southern District of California, Central Division.

The grounds upon which this motion is based are that the case was first brought in the Southern District of California, Central Division, that venue was properly laid therein, and that the United States District Court for the Southern District of California, Central Division improp-

[fol. 24] erly and contrary to law transferred the case to the District of Delaware.

Respectfully submitted, Thomas Cooch, Morford, Bennethum, Marvel & Cooch, Delaware Trust Building, Wilmington, Delaware, Leonard S. Lyon T C, Leonard S. Lyon, Jr. T C, Richard E. Lyon T C, Lyon & Lyon, 811 West Seventh Street, Los Angeles 17, California, Attorneys for Plaintiffs.

[fol. 25] EXHIBIT F TO PETITION

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Civil Action No. 1342

GULF RESEARCH & DEVELOPMENT COMPANY, WELEX JET SERVICES, INC., and BYRON JACKSON CO., Plaintiffs,

v.

SCHLUMBERGER WELL SURVEYING CORPORATION, Defendant

OPINION

Thomas Cooch (of Morford, Bennethum, Marvel & Cooch), of Wilmington, Del., Leonard S. Lyon, Leonard S. Lyon, Jr., and Richard E. Lyon (of Lyon & Lyon), of Los Angeles, California, for plaintiffs.

E. Ennalls Berl (of Southerland, Berl & Potter), of Wilmington, Del., Worthington Campbell and Mark N. Donohue (of Campbell, Brumbaugh, Free & Graves), of New York, N. Y., for defendant.

LEAHY, Chief Judge:

On March 20, 1950, plaintiffs brought suit against defendant for patent infringement in the United States District Court for the Southern District of California, Central Division. Service was made on defendant in Los Angeles on March 22, 1950. The complaint alleged plaintiffs' ownership of and right to sue under its patents, alleged defendant

Schlumberger to be a Delaware corporation doing business in the Southern District of California, Central Division, alleged that for the purpose of the case, Schlumberger was a resident of said District, and alleged infringement generally by Schlumberger. On April 10, 1950, Schlumberger filed a motion under § 1406 (a) of Title 28, U. S. C., to dismiss the complaint for want of proper venue on the ground [fol. 26] the complaint failed to allege acts of infringement in the California District as provided under § 1400 (b). Judge Harrison, after hearing and argument, denied the motion to dismiss but ordered the case transferred here to the Delaware court.[1] Plaintiffs' argument before Judge Harrison was that § 1400 (b)[2] must be read in the light of §1391 (c) of Title 28 U. S. C.[3] and that § 1391 (c) broadens the meaning of § 1400 (b) in that the definition of the former section applies to the latter. Judge Harrison held that § 1391 (c) is not complementary to § 1400 (b); that the word "resides" in § 1400 (b) means the same as the word "inhabitant" in the former § 109, and that the interpretation placed upon the former § 109 applies to its revision as set forth in the revised § 1400 (b). He considered the case of Stonite Products Co. v. Melvin Lloyd Co., 315 U. S. 561, 62 S. Ct. 780, 86 L. Ed. 1026,[4] as still the law and concluded

---

[1] Gulf Research & Development Company, et al. v. Schlumberger Well Surveying Corporation, D. C. S. D. Cal., 92 F. Supp. 16, 10 F. R. D. 353.

[2] "§ 1400 • • •

"(b) Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business."

[3] "§ 1391 • • •

"(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

[4] Judge Harrison quoted from the recent case of Ackerman v. Hook, 3 Cir., 183 F. 2d 11, 14, involving the relationship of § 1392 to § 1400 (b), where Judge McLaughlin said:

"the fact that the defendant committed no acts of infringement in this district indicates to me that the venue is improper." [5]

[fol. 27] After Judge Harrison's order transferring the litigation to this court, plaintiffs applied to the Court of Appeals for the Ninth Circuit for leave to file a Petition for Writ of Mandamus or Prohibition. That Court granted leave to file the petition and issued its order directed to Judge Harrison to show cause why the requested writ should not issue. After oral argument in the matter, the Court of Appeals filed its opinion denying plaintiffs' petition.[6] The grounds of denial were simply that the case was not such a critical one as to justify issuance of the extraordinary writ sought. No consideration was given to the merits of the venue question inherent in the case.

Immediately after the papers in this action were sent to and received in this court, plaintiffs moved to retransfer the case back to the California District Court on the grounds

---

"Beyond all doubt, until the adoption of the new Title 28 in 1948, Section 109 was 'the exclusive provision controlling venue in patent infringement proceedings'. Stonite Products Co. v. Melvin Lloyd Co., 315 U. S. 561, 62 S. Ct. 780, 781, 86 L. Ed. 1026. In that decision the Supreme Court expressly rejected the argument that Section 113 supplemented Section 109 because of its prior enactment and that the sections were complementary [citing the Stonite case]. The Reviser's Notes make it evident that today, 1400(b) stands in the same situation as did Section 109 at the time of the Stonite opinion in 1942 and that the Stonite case is just as much in point now as then."

[5] Gulf Research & Development Co., et al. v. Schlumberger Well Surveying Corporation, 92 F. Supp. 16, 19. The order to transfer was not based on any showing of *forum non conveniens*. It may be noted also that the present motion does not involve any consideration of the *forum non conveniens* doctrine. Cf. Aircraft Marine Products Inc. v. Burndy Engineering Company, D. C. S. D. Cal. Cent. Div., — F. Supp —, 89 U S. P. Q. 45.

[6] Gulf Research & Development Co., et al. v. Harrison, 9 Cir., 185 F. 2d 457.

the venue was properly laid where the action was originally brought and the case was transferred to this court improperly and contrary to law. This is the motion presently for disposition.

1. The initial question presented for decision by plaintiffs' motion is: Is this court empowered to retransfer this case to the Southern District of California? Defendant argues that to retransfer this case, I must first conclude Judge Harrison was in error in his disposition on the merits of the question of venue and that in the act of considering Judge Harrison's decision I would be performing the function of an appellate court, not of a nisi prius judge. Defendant further argues Judge Harrison's holding that venue was improperly laid in California was a clear adjudication of the merits and that his opinion is now the "law of this case", which may only be reviewed on the appellate level.

The law of the case rule is not advanced by defendant as a rule of law limiting the power of this court, but rather as a rule of comity. The doctrine, as the Supreme Court has [fol. 28] pointed out, "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." Messinger v. Anderson, 225 U. S. 436, 444, 32 S. Ct. 739, 56 L. Ed. 1152. It is a salutary doctrine "in the interest of economy of effort and of narrowing down the issues in successive stages of litigation." White v. Higgins, 1 Cir., 116 F. 2d 312, 317. Plaintiffs may be correct when they assert the doctrine usually only applies to effectuate consistent decisions "in the same court on the same point in the same case." Commercial Union of America, Inc. v. Anglo-South American Bank, Ltd., 2 Cir., 10 F. 2d 937, 941. However, there is respectable authority which appears squarely in point and upholds the defendant's contention here that Judge Harrison's decision on venue should be regarded by me as conclusive. These are the cases of Haesen v. United States, et al., D.C. E.D. N.Y., 66 F. Supp. 759, and Sbarbaro v. United States, et al., D.C. E.D. Pa., 86 F. Supp. 477. Without deciding specifically the instant situation falls within the traditional scope of

the doctrine of the law of the case,[7] I think that the same considerations which gave rise to that doctrine are applicable here. I conclude that though I may have the independent power to review Judge Harrison's determination in order to retransfer the case to California, I should not reexamine the question of venue which Judge Harrison decided under the particular circumstances of the case at bar.

Regardless of my own view as to whether the California Court was right in its interpretation of §§ 1391 (c) and 1400 (b), and, admittedly, there is serious conflict as to the [fol. 29] proper interpretation of those sections,[8] I do not

---

[7] See, however, James Wm. Moore, *Commentary on the United States Judicial Code* (1949), pp. 210-211:

"The denial of a motion to transfer constitutes the law of the case so that the matter should not be reopened except on a showing of subsequently developed facts or other circumstances warranting a departure from the settled ruling. Likewise if the motion to transfer is granted and the case is transferred to another district, this latter district should accept the ruling as the law of the case for it, and there should be no further transfer except under the most impelling and unusual circumstances."

[8] The following cases and authorities cited by plaintiffs support their position that § 1400 (b) has been enlarged by § 1391 (c) in patent venue cases: Radio Corporation of America v. Paramount Pictures, Inc., et al., D. C. S. D. Cal., Civil Action No. 8070—WM, 1950; Farr v. Gratiot, et al., D.C. S.D. Cal., 92 F. Supp. 320; Dalton v. Shakespeare Co., D.C. S.D. Fla., No. 1884—Civil Tampa; James Wm. Moore, *Moore's Commentary on the U. S. Judicial Code* (1949), 178, 192-194; Edward L. Barrett, Jr., "The Federal Judicial Code of 1948," XXIII *Journal of the State Bar of California*, p. 324; Barron and Holtzoff, *I Federal Practice and Procedure* (1950), § 80, pp. 153, 154; Schoen v. Mountain Producers Corporation, 3 Cir., 170 F. 2d 707 at p. 713, footnote 10; Lipp et al. v. National Screen Service Corp., D.C. E.D. Pa., 95 F. Supp. 66.

The cases and authorities relied upon by the defendant

think it meet or proper that I review Judge Harrison's decision on the merits.[9] To do so would be a usurpation of an appellate function; and on at least one other occasion I have refused to so act.[10] Though counsel for plaintiffs and defendant have addressed themselves both in their briefs and oral argument to the merits of Judge Harrison's holding on the venue question, all of the contentions on the merits were before Judge Harrison. It is now for an appellate court—not for me—to correct any error, if error there be, in his opinion. It is not only the principle of comity and the fact that Judge Harrison's opinion may be likened, at this stage, to the "law of this case" which compels me to this conclusion, but, what seems of most importance to me are considerations for the orderly functioning of the judicial process. If I should grant plaintiffs' motion and say, in effect, to Judge Harrison, "you were wrong [fol. 30] in transferring this case to Delaware," I do not think he, in turn, would be any more bound to take and try

---

in support of its counter-position are: Gulf Research & Development Co., et al. v. Schlumberger Well Surveying Corporation, D.C. S.D. Cal., 92 F. Supp. 16; Nachtman v. Jones & Laughlin Steel Corp., D.C. D. of C., 90 F. Supp. 739; Stonite Products Co. v. Melvin Lloyd Co., 315 U. S. 561, 86 L. Ed. 1026, 62 S. C. 780; James Wm. Moore, Statement to House Judiciary Committee, Subcommittee No. 1, U. S. Code Congressional Service (1948), p. 1969, Title 28 Pamphlet; Ackerman v. Hook, 3 Cir., 183 F. 2d 11.

[9] I am cognizant of the argument made by plaintiffs' counsel that plaintiffs are not here "merely seeking a review" of Judge Harrison's holding. Counsel argues that this case is not properly before this court because proper venue is in the Southern District of California and this case was transferred by Judge Harrison without statutory sanction and authority. But, in order to decide whether Judge Harrison exceeded his power, as plaintiffs argue, I would have to subject his action to my scrutiny which is, in essence, the same thing I would do if I were sitting as an appellate judge reviewing his decision.

[10] In re Triton Chemical Corporation, D. C. Del., 46 F. Supp. 326, 328, n. 3.

the case on the merits, thereby respecting my views, than I had shown myself to be in ignoring his considered judgment. If both Judge Harrison and I were obdurate in our positions, this case could conceivably shuttle back and forth interminably between California and Delaware. Such an eventuality should be avoided.

An order may be submitted denying the present motion to retransfer the cause to California.

Dated: May 18, 1951.

[fol. 31] EXHIBIT G TO PETITION

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Civil Action No. 1342

GULF RESEARCH & DEVELOPMENT COMPANY, WELEX JET SERVICES, INC., and BYRON JACKSON CO., Plaintiffs,

v.

SCHLUMBERGER WELL SURVEYING CORPORATION, Defendant

ORDER

And Now to-wit this 23rd day of May, 1951, the matter above-captioned having come on to be heard on plaintiffs' motion for an order transferring this action to the United States District Court for the Southern District of California, Central Division; the arguments of counsel having been heard and the briefs of counsel having been read; and the Court having filed herein on May 18, 1951, an opinion; it is, for the reasons stated in said opinion,

Ordered, Adjudged and Decreed that said motion be, and the same hereby is, denied.

(S.) Paul Leahy, United States District Judge.

Approved as to form: (S.) Thomas Cooch, Attorney for Plaintiffs; (S.) E. Ennalls Berl, Attorney for Defendant.

[fol. 32] [File endorsement omitted]

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,488

GULF RESEARCH & DEVELOPMENT COMPANY, WELEX JET SERVICES, INC., and Byron Jackson Co., Petitioners,

v.

THE HONORABLE PAUL LEAHY, United States District Judge, Respondent

ORDER TO SHOW CAUSE—June 7, 1951

Present: Goodrich and Kalodner, Circuit Judges, and Marsh, District Judge

And now, to wit, this 7th day of June, 1951, upon consideration of the petition of Gulf Research & Development Company, Welex Jet Services, Inc. and Byron Jackson Co. praying that a rule issue against the Honorable Paul Leahy, Chief Judge of the United States District Court for the District of Delaware, directing him to nullify, vacate, and set aside an order entered by him on the 23rd day of May, 1951, in Civil Action No. 1342 in the United States District Court for the District of Delaware, denying a motion of petitioners for an order transferring said action to the United States District Court for the Southern District of California, Central Division, and for other relief, having been considered by the court,

[fol. 33] It is ordered that the Honorable Paul Leahy, Chief Judge of the United States District Court for the District of Delaware show cause why a writ of mandamus should not issue as prayed for; and

It is further ordered that the respondent file his answer to the petition on or before July 30, 1951; that the petitioners file their brief on or before August 30, 1951; that the respondent file his brief on or before September 30, 1951 and that the matter be set down for oral argument in October, 1951.

It is further ordered that the copies of the petition and supporting brief and a certified copy of this order be served

by the petitioners upon respondent by mail within five days after the entry of this order.

By the Court, Herbert F. Goodrich, Circuit Judge.

[fol. 34] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

ANSWER OF RESPONDENT—Filed July 6, 1951

To the Honorable, the Judges of the United States Court of Appeals for the Third Circuit:

I, Paul Leahy, Chief Judge of the District Court of the United States for the District of Delaware, in obedience to the rule herein issued out of this Court on June 7, 1951, directing me to show cause why a Writ of Mandamus should not be issued as prayed for in the petition of Gulf Research & Development Company, Welex Jet Services, Inc. and Byron Jackson Co., do hereby make the following return to this Honorable Court:

1. I admit the allegations of the first paragraph of said petition (page 1) except that I deny that said paragraph fully and accurately summarizes my disposition of petitioner's motion in the action entitled *Gulf Research & Development Company, Welex Jet Services, Inc. and Byron Jackson Co. v. Schlumberger Well Surveying Corporation,* [fol. 35] Civil Action No. 1342 in the United States District Court for the District of Delaware seeking an order transferring said action to the United States District Court for the Southern District of California, Central Division, and refer to said motion, to my opinion dated May 18, 1951, and to my order entered on May 23, 1951 in said action (Exhibits E, F and G to the petition) for my disposition of said motion and my reasons therefor;

2. Answering the allegations appearing in the petition (page 2 thereof) under the heading "Nature of the Suit and Proceedings", I admit the allegations appearing in the first

paragraph under said heading but deny that the allegations appearing in the remaining paragraphs under said heading fully summarize the allegations of the complaint (Exhibit A to the petition) and I refer to said complaint for the substance of the allegations thereof;

3. Answering the allegations appearing in the petition (pages 3 and 4 thereof) under the heading "Proceedings Following the Filing of the Complaint" and the sub-heading "A. In the United States District Court for the Southern District of California, Central Division", I deny that said allegations fully summarize the proceedings in said action in the United States District Court for the Southern District of California, Central Division, and I refer to the complaint in said action, to defendant's motion to dismiss complaint under Section 1406(a) of the United States Code, Title 28, to the opinion of Judge Harrison (Exhibits A, B and C to the petition) and to the order entered by Judge Harrison on August 18, 1950 (Exhibit 1 attached hereto) for the nature of the proceedings following the filing of the complaint in said District Court of the United States for the Southern District of California, Central Division;

[fol. 36] 4. Answering the allegations appearing in the petition (page 4 thereof) under the sub-heading "B. In the United States Court of Appeals for the Ninth Circuit" I admit that what purports to be a copy of an opinion of the United States Court of Appeals for the Ninth Circuit, dated November 20, 1950, on a petition for Writ of Mandamus in a proceeding entitled *Gulf Research & Development Company, Welex Jet Services, Inc., and Byron Jackson Co.* v. *Honorable Ben Harrison, Judge, United States District Court for the Southern District of California, Central Division,* No. 12667 in said United States Court of Appeals, is attached to the petition as Exhibit D; I admit that Judge Harrison's order of transfer (Exhibit 1 attached hereto) was effectuated on December 26, 1950 by the mailing of papers comprising the record in said action entitled Gulf et al. v. Schlumberger to the United States District Court for the District of Delaware; but as to the remaining allegations appearing in said petition under said sub-heading, I state I am without knowledge or information sufficient to form a belief inasmuch as the files forwarded to me do not

contain the proceeding had in the United States Court of Appeals for the Ninth Circuit.

5. I admit the allegations appearing in the petition (page 4 thereof) under the sub-heading "C. In the United States District Court for the District of Delaware";

6. Answering the allegations appearing in the petition (page 5 thereof) under the heading "Opinion and Order of the Trial Court" I admit that on May 18, 1951 I filed an opinion (Exhibit F to petition) in said action; I admit that on May 23, 1951 I entered an order (Exhibit G to petition) [fol. 37] in said action denying said motion for reasons stated in said opinion; but I deny that the first sentence in said paragraph accurately and fully summarizes what I decided in said opinion and refer to said opinion (Exhibit F to petition) and to said order (Exhibit G to petition) for what was decided;

7. I admit the allegations appearing in said petition at page 5 thereof under the heading "Basis of Court's Jurisdiction";

8. Answering the allegations appearing in the petition (pages 5 and 6 thereof) under the heading "Reasons for Allowance of Writ" I admit the allegations contained in sub-paragraph 1 thereof; I deny the allegations contained in sub-paragraphs 2, 3, 4 and 5 thereof, and am content to await the action of this Honorable Court regarding the issuance of a Writ of Mandamus herein.

9. I hereby appoint E. Ennalls Berl, Worthington Campbell and Mark N. Donohue as my attorneys.

(S.) Paul Leahy, Chief Judge of the District Court
For the District of Delaware.

[fol. 38] EXHIBIT 1 TO ANSWER

Hill, Morgan & Farrer
William M. Farrer
411 West Fifth Street
Los Angeles 13, California

TRinity 0918

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

Civil Action No. 11264-BH

GULF RESEARCH & DEVELOPMENT COMPANY, WELEX JET SERVICES, INC., and Byron Jackson Company, Plaintiffs,

vs.

SCHLUMBERGER WELL SURVEYING CORPORATION, Defendant

ORDER OF TRANSFER

The defendant's motion in the above cause came on to be heard for an order dismissing the complaint for improper venue, and upon consideration of the arguments and briefs of counsel for the parties, and pursuant to the opinion of the Court rendered herein on the 2nd day of August, 1950.

It is ordered

1) That the venue of this civil action for patent infringement is improperly laid in this district.

2) That in the interest of justice and pursuant to the provisions of United States Code, Title 28, Section 1406(a), this action shall be and the same hereby is transferred from [fol. 39] the United States District Court for the Southern District of California, Central Division, to the United States District Court for the District of Delaware, of which District the defendant corporation is a resident, and that all papers in said action, or certified copies thereof, be transmitted forthwith by the clerk of this court under the

seal of this court to the said United States District Court for the District of Delaware.

Dated: August 18, 1950.

(S.) Ben Harrison, United States District Judge.

[fol. 40] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

STIPULATION RE INTERVENTION

Schlumberger Well Surveying Corporation, having served its Notice of Motion returnable July 30, 1951, for leave to intervene herein, and having attached a copy of its proposed Answer, it is

Stipulated and Agreed between counsel for the respective parties that said application for intervention be granted and that an order to that effect may be presented for signature forthwith without further notice.

(S.) Thomas Cooch, Attorney for Petitioners; (SL.) E. Ennalls Berl, Attorney for Respondent; (S.) E. Ennalls Berl, Attorney for Intervenor.

[fol. 41] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

NOTICE OF MOTION FOR LEAVE TO INTERVENE—July 20, 1951

To: Thomas Cooch, Esq.
Morford, Bennethum, Marvel & Cooch
Delaware Trust Building
Wilmington 1, Delaware

Sir:

Please take notice that on the 30th day of July 1951, at 10:00 A.M., or as soon thereafter as counsel can be heard, the undersigned will present the within motion to the United States Court of Appeals for the Third Circuit, or to one of the Judges thereof, at the Court House at Ninth and Chestnut Streets, Philadelphia, Pennsylvania.

(S.) E. Ennalls Berl, Delaware Trust Building, Wilmington, Delaware, Attorney for Intervenor.

[fol. 42] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

MOTION TO INTERVENE

And now, to-wit, this 30th day of July, A. D. 1951, Schlumberger Well Surveying Corporation, defendant in Civil Action No. 1342, pending in the District Court of the United States for the District of Delaware, which action forms the subject matter of the petition herein, applies to this Honorable Court, by its attorneys, E. Ennalls Berl, Worthington Campbell and Mark N. Donohue, for leave to intervene in these proceedings for the purpose of filing its answer herein, a copy of which is attached hereto as Exhibit A, and filing briefs and participating in the oral argument.

The grounds for this motion are as follows:

1. The applicant will be bound by a judgment in this action and the representation of applicant's interests by respondent herein may be inadequate.

2. Inasmuch as the applicant's proposed answer is sub-
[fol.43] stantially the same as the answer already filed by respondent, applicant's defense raises questions of law which are identical to those raised by the answer of respondent.

3. Intervention by the applicant will not unduly delay or prejudice the adjudication of the rights of the original parties.

(S.) E. Ennalls Berl, 948 Delaware Trust Building, Wilmington, Delaware; (S.) Worthington Campbell, (S.) Mark N. Donohue, 90 Broad Street, New York, N. Y.

[fol. 44] EXHIBIT "A" TO MOTION

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,488

In the Matter of the Petition of GULF RESEARCH & DEVELOPMENT COMPANY WELEX JET SERVICES, INC., and BYRON JACKSON CO., Petitioners,

For a Writ of Mandamus

against

THE HONORABLE PAUL LEAHY, Chief Judge of the District Court of the United States for the District of Delaware, Respondent

ANSWER OF INTERVENOR

To the Honorable, the Judges of the United States Court of Appeals for the Third Circuit:

Schlumberger Well Surveying Corporation, intervenor, answers the petition herein as follows:

1. Intervenor admits the allegations of the first paragraph of said petition (page 1) except that intervenor de-

nies that said paragraph fully and accurately summarizes respondent's disposition of petitioner's motion in the action entitled *Gulf Research & Development Company, Welex Jet Services, Inc., and Byron Jackson Co.* v. *Schlumberger Well Surveying Corporation,* Civil Action No. 1342, in the United States District Court for the District of Delaware, seeking an order transferring said action to the United States District Court for the Southern District of California, Central Division, and refers to said motion, to respond-
[fol. 45] ent's opinion dated May 18, 1951, and to the order entered by respondent on May 23, 1951, in said action (Exhibits E, F and G to the petition) for respondent's disposition of said motion and his reasons therefor;

2. Intervenor, answering the allegations appearing in the petition (page 2 thereof) under the heading "Nature of the Suit and Proceedings", admits the allegations appearing in the first paragraph under said heading, but denies that the allegations appearing in the remaining paragraphs under said heading fully summarize the allegations of the complaint (Exhibit A to the petition) and refers to said complaint for the substance of the allegations thereof;

3. Intervenor, answering the allegations appearing in the petition (pages 3 and 4 thereof) under the heading "proceedings Following the Filing of the Complaint" and the sub-heading "A. In the United States District Court for the Southern District of California, Central Division", denies that said allegations fully summarize the proceedings in said action in the United States District Court for the Southern District of California, Central Division, and refers to the complaint in said action, to defendant's motion to dismiss the complaint under Section 1406(a) of the United States Code, Title 28, to the opinion of Judge Harrison (Exhibits A, B and C to the petition) and to the order entered by Judge Harrison on August 18, 1950 (Exhibit 1 attached respondent's answer) for the nature of the proceedings following the filing of the complaint in said District Court of the United States for the Southern District of California, Central Division.

[fol. 46] 4. Intervenor, answering the allegations appearing in the petition (page 4 thereof) under the sub-heading "B. In the United States Court of Appeals for the Ninth

Circuit", admits that the United States Court of Appeals for the Ninth Circuit granted leave to petitioners to file their petition in that Court for a Writ of Mandamus; admits that after oral argument said United States Court of Appeals for the Ninth Circuit filed an opinion denying the petition; admits that Judge Harrison's Order of Transfer was effectuated on December 26, 1950, by the mailing of the original papers comprising the record in said action to the District Court of the United States for the District of Delaware; but denies that the allegations contained in said paragraph of the petition to this Court fully and accurately summarize the grounds of the denial of the petition to the United States Court of Appeals for the Ninth Circuit, and refers to the opinion of said Court of Appeals (Exhibit D to petition) for said grounds;

5. Intervenor admits the allegations appearing in the petition (page 4 thereof) under the sub-heading "C. In the United States District Court for the District of Delaware";

6. Intervenor, answering the allegations appearing in the petition (page 5 thereof) under the heading "Opinion and Order of the Trial Court", admits that on May 18, 1951, respondent filed an opinion (Exhibit F to petition) in said action; admits that on May 23, 1951, respondent entered an order (Exhibit G to petition) in said action denying [fol. 47] said motion for reasons stated in said opinion; but denies that the first sentence in said paragraph accurately and fully summarizes what respondent decided in said opinion and refers to said opinion (Exhibit F to petition) and said order (Exhibit G to petition) for what was decided;

7. Intervenor admits the allegations appearing in said petition at page 5 thereof under the heading "Basis of Court's Jurisdiction";

8. Intervenor, answering the allegations appearing in the petition (pages 5 and 6 thereof) under the heading "Reasons for Allowance of Writ", admits that this Court under the provisions of Section 1561(a) of Title 28, United States Code, has the power to issue all writs necessary or appropriate in aid of its jurisdiction and agreeable to the usages and principles of law, but denies that this is an ap-

propriate case for this Court to exercise its power to issue the writ of mandamus prayed for by the petitioners; admits the allegations contained in sub-paragraph 1 under said heading; and denies the allegations contained in sub-paragraphs 2, 3, 4 and 5 under said heading.

Having fully answered the petition herein, intervenor prays that the writ be denied and the petition herein be dismissed.

(S.) E. Ennalls Berl, 948 Delaware Trust Building, Wilmington, Delaware. (S.) Worthington Campbell, Mark N. Donohue, 90 Broad Street, New York, New York, Attorneys for Schlumberger Well Surveying Corporation.

[fols. 48-52] [File endorsement omitted]

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

ORDER GRANTING MOTION TO INTERVENE—July 30, 1951

Upon consideration of the motion by Schlumberger Well Surveying Corporation for leave to intervene, to file an answer, to file briefs and to participate in the oral argument, and of the stipulation by counsel for the petitioner and counsel for the respondent and the intervenor that an order granting the intervention may be entered without further notice,

It is Ordered that the motion be, and it is hereby granted.

William H. Hastie, Circuit Judge.

July 30, 1951.

[fol. 53] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

STIPULATION AND ORDER RE FILING BRIEFS—August 23, 1951

It is hereby stipulated by and between the parties by their respective attorneys, subject to the approval of the Court or a Judge thereof, that the time within which petitioners shall file their brief shall be extended to include September 30, 1951; that the time within which respondent shall file his brief and the intervenor shall file its brief shall be extended to include October 30, 1951; and that the matter shall be set down for oral argument in November, 1951.

Thomas Cooch, Attorney for Petitioners. E. Ennalls Berl, Attorney for Respondent and Intervenor.

August 20, 1951.

ORDER

And now to-wit this 23d day of August, 1951, the foregoing stipulation is approved and the matters agreed to therein are hereby ordered.

Maris, United States Circuit Judge.

[fol. 54] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

APPENDIX TO BRIEF SUBMITTED ON BEHALF OF RESPONDENT AND INTERVENOR—Filed October 27, 1951

E. Ennalls Berl, Delaware Trust Building, Wilmington 1, Delaware; Worthington Campbell, Mark N. Donohue, 90 Broad Street, New York 4, New York, Attorneys for Respondent and Intervenor.

[fol. 55] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA, TAMPA DIVISION

Case No. 1884. Civil. Tampa

Filed June 28, 1951, Tampa, Fla.

Edwin R. Williams, Clerk. C. O. B.—10—984

PHILIP P. DALTON, Plaintiff,

vs.

SHAKESPEARE COMPANY, a Corporation, Defendant

ORDER

This cause came on for hearing on the 15th day of June, 1951, on Defendant's Petition for the Court to reconsider its order entered in this cause on the 23rd day of October, 1950, and the Court having heard argument of counsel for the respective parties, and finding that its original order on defendant's Motion to Dismiss, entered herein on the 15th day of June, 1950, was correct, and further finding that the Plaintiff has not obtained jurisdiction in this Court over the Defendant for the purpose of asserting a cause of action for patent infringement, and being otherwise advised in the premises, it is hereby,

Ordered and Adjudged that the Amended Complaint be and the same is hereby dismissed without prejudice for the Plaintiff to file a suit for patent infringement in the proper jurisdiction, and with leave unto the Plaintiff to file a re-amended complaint in this Court, leaving out all references to a cause of action for patent infringement, within twenty [fol. 56] days from the date hereof, and with leave unto the Defendant to file defensive pleadings as it may be advised within twenty days after service upon its counsel of copy of said re-amended complaint.

It is further ordered and adjudged that the ruling upon the motion of the Defendant to quash the writ of service of process herein, so far as an action based upon unfair competition is concerned, be and the same is hereby reserved pending the filing of said re-amended complaint, and any motion addressed thereto by the Defendant.

Done and ordered at Tampa, Florida, this 28 day of June, 1951.

(S.) George W. Whitehurst, United States District Judge.

[fol. 57] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,488

GULF RESEARCH & DEVELOPMENT COMPANY, WELEX JET SERVICES, INC., and Byron Jackson Co., Petitioners,

vs.

THE HONORABLE PAUL LEAHY, United States District Judge, Respondent,

and

SCHLUMBERGER WELL SURVEYING CORPORATION, Intervenor

PETITION FOR WRIT OF MANDAMUS

Argued November 13, 1951

Before Maris, Kalodner and Staley, Circuit Judges

OPINION OF THE COURT—Filed December 13, 1951

By MARIS, Circuit Judge:

This is a petition for a writ of mandamus to the Chief Judge of the United States District Court for the District of Delaware as respondent directing him to vacate and set aside a certain order entered by him in an action entitled Gulf Research & Development Company, Welex Jet Services, Inc. and Byron Jackson Co. v. Schlumberger Well Surveying Corporation, Civil Action No. 1342 in that court. [fol. 58] Gulf et al. v. Schlumberger is an ordinary civil action for patent infringement in which the petitioners here are plaintiffs and Schlumberger Well Surveying Corporation, the intervenor here, is the defendant. The complaint was originally filed in the United States District Court for

the Southern District of California. The action was transferred to the District of Delaware by order of the Southern California District Court. The transfer order was entered pursuant to Sec. 1406(a) of Title 28, U.S.C., on the motion of the defendant attacking venue in the Southern California District Court. Upon arrival of the files in the case in the Delaware District Court, plaintiffs moved to retransfer the case back to the Southern California District Court on the grounds that venue in the Southern District of California was proper and the transfer to the District of Delaware was improper and contrary to law. The present petition is directed to respondent's order denying this motion.

Venue is the only issue so far litigated in this action. It was first raised when defendant filed its motion, under the provisions of Sec. 1406(a), to dismiss the complaint on the ground that the venue as laid in the Southern District of California was improper. This motion was based on the contention that the venue in patent actions is controlled exclusively by Sec. 1400(b) of Title 28, U.S.C., which requires that a patent infringement case be brought either in the district of the residence of the defendant, or in the district where the defendant has committed acts of infringement and has a regular and established place of business. In support of the motion the defendant contended that as a corporation of the State of Delaware it is a resident only of the District of Delaware within the meaning of the venue statute, that while it was doing business in the Southern District of California it had not committed acts of infringement in that district, and that accordingly the Southern District of California satisfied neither of the alternative [fol. 59] requirements for venue in patent infringement cases which are specified in Sec. 1400(b).

Plaintiffs contested the motion attacking venue in the Southern California District Court. They urged that Sec. 1400(b) must be construed in the light of the definition of corporate residence contained in Sec. 1391(c) of Title 28, U.S.C., to permit a patent infringement suit against a corporate defendant (as distinguished from an individual or partnership defendant) in any district in which such defendant is doing business even though it has not committed acts of infringement there.

The Southern California District Court held that de-

fendant's position on the venue issue and on the interpretation to be accorded Sec. 1400(b) was correct. Instead of dismissing the complaint, however, it directed that, in the interests of justice and pursuant to Sec. 1406(a), the case be transferred to the District of Delaware, the district in which intervenor was incorporated. 92 F. Supp. 16, 10 F.R.D. 353. The decision, which was entered by District Judge Harrison, was in direct conflict with a decision of the same court entered a few days earlier by District Judge Hall in Farr Co. v. Gratiot, 1950, 92 F. Supp. 320.

Before the transfer order was executed, plaintiffs applied to and obtained leave of the Court of Appeals for the Ninth Circuit to file a petition for a writ of mandamus or prohibition directing Judge Harrison to vacate and set aside the transfer order on the ground that his ruling on venue was in error. This petition was denied, after argument, by the Court of Appeals for the Ninth Circuit. That Court pointed out that mandamus is an extraordinary remedy reserved for really extraordinary cases and that in the petition before it no extraordinary circumstances had been called to the Court's attention. It held that the petitioners alleged nothing more than an erroneous application of the law which would be reviewable on appeal to the Court of Appeals for the Third Circuit after final judgment, hence the case was not an appropriate one for the extraordinary [fol. 60] remedy of mandamus. Gulf Research & Development Co. v. Harrison, 1950, 185 F. 2d 457.

In due course the action was transferred to the Delaware District Court and was docketed in that court. Thereupon the plaintiffs moved to retransfer the case back to Southern California on the grounds that venue was properly laid in that district and that Judge Harrison's ruling on the venue issue was erroneous. The motion was denied by Chief Judge Leahy who held that while he had the power to review Judge Harrison's determination of the venue issue, the considerations which give rise to the doctrine of the law of the case, the principles of the rule of comity and considerations for the orderly functioning of the judicial process, compelled him to the conclusion that he should not re-examine this previously litigated and adjudicated issue.

F. Supp. . It is the order denying the motion to re-

transfer the action which the petitioners here seek to have Chief Judge Leahy directed to vacate.

The respondent and intervenor urge that an appropriate case for mandamus is not presented by these facts since the petitioners will have an adequate remedy by appeal from any judgment which may be entered against them in the Delaware District Court. We agree.

Assuming that the order of the Southern California District Court was erroneous in sustaining the defendant's objection to the venue and that its order transferring the action to the District of Delaware was accordingly invalid, the error is one which this court will have power to correct upon appeal from the judgment ultimately entered in the action by the Delaware District Court. For if the order of transfer was erroneous all subsequent proceedings in the Delaware District Court are subject to that initial infirmity. It is an infirmity which the plaintiffs may doubtless waive since the court has jurisdiction of the subject matter and the parties are actually before it. But it is in the nature of a venue objection which, timely asserted as it has been here, the appearance of the plaintiffs in the Delaware District [fol. 61] Court will not operate to waive.[1] Accordingly unless the plaintiffs should subsequently waive their objection to the order of transfer they will be entitled to assert it on appeal and, if the objection is sustained, obtain from this court an order vacating the judgment of the Delaware District Court and directing the remand of the action to the Southern District of California. The Court of Appeals for the Ninth Circuit so concluded in the mandamus proceeding brought by these petitioners before it and we agree with its conclusion.

In Ex parte Fahey, 1947, 332 U. S. 258, the Supreme Court said (pp. 259-260):

> "Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel

---

[1] Compare Orange Theatre Corp. v. Rayherstz Amusement Corp., 3 Cir. 1944, 139 F. 2d 871, cert. den. 322 U. S. 740.

or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy. We are unwilling to utilize them as substitutes for appeals. As extraordinary remedies, they are reserved for really extraordinary causes."

Since an appeal in this action will be just as adequate as in any other case where an objection to jurisdiction or venue is overruled by the trial court and after a trial on the merits the objection is sustained on appeal from the final judgment[2] there are here no extraordinary circumstances which call for resort to the extraordinary remedy of mandamus. The mere fact that the petitioners will be put to the inconvenience and expense of what may prove to be a wholly abortive trial is an argument which might be addressed to Congress in support of legislation authorizing interlocutory appeals [fol. 62] but does not constitute ground for invoking mandamus power. As the Supreme Court said in Roche v. Evaporated Milk Assn., 1943, 319 U. S. 21, 30:

"Respondents stress the inconvenience of requiring them to undergo a trial in advance of an appellate determination of the challenge now made to the validity of the indictment. We may assume, as they allege, that that trial may be of several months' duration and may be correspondingly costly and inconvenient. But that inconvenience is one which we must take it Congress contemplated in providing that only final judgments should be reviewable. Where the appeal statutes establish the conditions of appellate review, an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions and thwart the Congressional policy against piecemeal appeals in criminal cases. *Cobbledick v. United States,* 309 U. S. 323."

What the Supreme Court said in U. S. Alkali Assn. v. U. S., 1945, 325 U. S. 196, 202-203, is equally applicable:

"It is evident that hardship is imposed on parties who are compelled to await the correction of an alleged

[2] See, e.g., Blank v. Bitker, 7 Cir. 1943, 135 F. 2d 962.

error at an interlocutory stage by an appeal from a final judgment. But such hardship does not necessarily justify resort to certiorari or other of the extraordinary writs as a means of review. In such cases appellate courts are reluctant to interfere with decisions of lower courts, even on jurisdictional questions, which they are competent to decide and which are reviewable in the regular course of appeal. *In re Tampa Suburban R. Co., supra; Ex parte Harding,* 219 U. S. 363, 369; *Roche v. Evaporated Milk Assn., supra,* 30-31, and cases cited; cf. *Stoll v. Gottlieb,* 305 U. S. 165; *Treinies v. Sunshine Mining Co.,* 308 U. S. 66. The writs may not be used as a substitute for an authorized appeal; and where, as here, the statutory scheme permits appellate review of [fol. 63] interlocutory orders only on appeal from the final judgment, review by certiorari or other extraordinary writ is not permissible in the face of the plain indication of the legislative purpose to avoid piecemeal reviews. *Roche v. Evaporated Milk Assn., supra,* 30, and cases cited; and see *Cobbledick v. United States,* 309 U. S. 323."

The petitioners argue that writs of mandamus have been granted by courts of appeals in cases involving the transfer of actions from one district to another and it cites a number of cases from various courts of appeals, including ours. Those cases, however, have all involved transfers under Sec. 140(a) of Title 28, U.S.C., the forum non conveniens section. As we pointed out in Pennsylvania Turnpike Commission v. Welsh, 1951, 188 F. 2d 447, 449, footnote 2, these cases normally deal with an issue, the convenience of parties and witnesses, "which in its nature must be reviewed before trial, if at all." It may, therefore, be, as some courts of appeals have held,[3] that the remedy of mandamus should be available to prevent an abuse of discretion in such transfers. Moreover this court has held that mandamus is available in

---

[3] Magnetic Engineering & Mfg. Co. v. Dings Mfg. Co., 2d Cir. 1950, 178 F. 2d 866; Ford Motor Co. v. Ryan, 2 Cir. 1950, 182 F. 2d 329, cert. den. 340 U. S. 851; Atlantic Coast Line R. Co. v. Davis, 5 Cir. 1950, 185 F. 2d 766; Nicol v. Koscinski, 6 Cir. 1951, 188 F. 2d 537.

such a case to direct a district judge to exercise his discretion when he has declined to do so on the erroneous ground that the statute does not give him discretionary power to make the transfer requested.[4]

It is true that in some cases the courts of appeals have gone farther and entertained on their merits applications for mandamus in transfer cases under Sec. 1404(a) which involved a definite want of statutory authority to make the proposed transfer and not merely an abuse of discretion in [fol. 64] balancing the conveniences involved.[5] It must be conceded that these cases conflict in principle with our present decision. However, we cannot follow them for the reasons stated by the Supreme Court in its opinions in Ex parte Fahey, Roche v. Evaporated Milk Assn. and U. S. Alkali Assn. v. U. S. from which we have already quoted.

The petition for a writ of mandamus will be denied.

---

[4] Paramount Pictures v. Rodney, 3 Cir. 1950, 186 F. 2d 111, cert. den. 340 U. S. 953.

[5] Foster-Milburn Co. v. Knight, 2 Cir. 1950, 181 F. 2d 949; Shapiro v. Bonanza Hotel Co., 9 Cir. 1950, 185 F. 2d 777; Fettig Canning Co. v. Steckler, 7 Cir. 1951, 188 F. 2d 715, cert. den. 341 U. S. 951.

[fol. 65] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,488

GULF RESEARCH & DEVELOPMENT COMPANY, WELEX JET SERVICES, INC., and BYRON JACKSON CO., Petitioners,

vs.

HONORABLE PAUL LEAHY, United States District Judge, Respondent

and

SCHLUMBERGER WELL SURVEYING CORPORATION, Intervenor

ORDER DENYING PETITION FOR MANDAMUS—December 13, 1951

Present Maris, Kalodner and Staley, Circuit Judges

The petition for writ of mandamus filed in the above-entitled cause is hereby denied, with costs to be taxed in favor of the intervenor.

Attest:

Ida O. Creskoff, Clerk.

December 13, 1951.

[fol. 66] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 67] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 24

THE GULF RESEARCH AND DEVELOPMENT COMPANY et al., Petitioners,

vs.

The Honorable PAUL LEAHY, United States District Judge, et al.

ORDER ALLOWING CERTIORARI—Filed April 21, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

The Chief Justice took no part in the consideration or decision of this application.